



ROBIN CONLEY

CONFRONTING
the DEATH
PENALTY

How Language Influences
Jurors in Capital Cases

OXFORD STUDIES IN LANGUAGE AND LAW

Confronting the Death Penalty

*How Language Influences Jurors
in Capital Cases*

ROBIN CONLEY

OXFORD
UNIVERSITY PRESS

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Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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Oxford New York

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Published in the United States of America by
Oxford University Press
198 Madison Avenue, New York, NY 10016

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Library of Congress Cataloging-in-Publication Data
Conley, Robin, author.

Confronting the death penalty : how language influences jurors
in capital cases / Robin Conley.

p. cm. — (Oxford studies in language and law)

Includes bibliographical references and index.

ISBN 978-0-19-933416-2 (hardcover : alk. paper) 1. Capital punishment—
United States. 2. Jury—United States. 3. Decision making. I. Title.

KF9227.C2C65 2016

345.73'0773—dc23

2015009933

1 3 5 7 9 8 6 4 2

Printed in the United States of America on acid-free paper

CONFRONTING THE DEATH PENALTY

OXFORD STUDIES IN LANGUAGE AND LAW

Oxford Studies in Language and Law includes scholarly analyses and descriptions of language evidence in civil and criminal law cases as well as language issues arising in the area of statutes, statutory interpretation, courtroom discourse, jury instructions, and historical changes in legal language.

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Confronting the Death Penalty: How Language Influences Jurors in Capital Cases

Robin Conley

*To my parents,
for introducing me to language.*

ACKNOWLEDGMENTS

This book and the research behind it are, as I'm sure any author would acknowledge, very dear to me. Those who have helped it along its way are dear to me as well. The first thanks are due to my parents for making me into the person and, in the case of my father, the scholar that I am. Their support of my schooling, research, and writing has made this book and so much else possible. I would also like to recognize Steve Riner for his warm love and support and for the all-important laughter he brings to my life.

The research for this book was funded generously by grants from the Wenner Gren Foundation and the National Institute of Justice. The time I spent in Texas was made possible by their support, as well as by grants from the UCLA Department of Anthropology. My advisors and friends at UCLA have enriched my research and academic life more generally. I thank Alessandro Duranti, Justin Richland, Elinor Ochs, Candy Goodwin, and John Heritage for their continued advice, encouragement, and criticism. Because of them, I am miles from the first-year graduate student I was

years ago. I also owe Paige Sullivan, Steve Black, and Netta Avineri my gratitude for reading drafts of the book as they progressed and my wonderful research assistant, Maria Orsini, for her swift and thorough work. I am additionally indebted to Bryan D. Carnes for his close reading of the many iterations of my chapters.

I am also grateful to and humbled by the people in Texas who allowed me into their lives. The attorneys, staff, and interns at the Texas Defender Service were a constant inspiration to me, and their support and friendship has been invaluable. They were the only organization brave enough to let an anthropologist in their midst, and I thank them for that. I would especially like to acknowledge Gwen Nolan, John Niland, Kathryn Kase, Peter Walker, Jared Tyler, Gloria Flores, and Alma Lagarda, from whom I learned so much. To the other attorneys who shared their practice, struggles, and triumphs with me, especially Billy Carter and Hope Knight, I hope I've done you justice. Also, Megan Fenner, your hospitality made my stay in Texas homey and safe, and I thank you for that. I must also acknowledge the defendants, victims, and families involved in Texas capital trials, whose pain permeated my days in Texas. The system is broken and its workings break everyone caught up in it.

And a final, resounding thank you to the capital jurors who were generous enough to lend me their time and stories. I hope I have treated your words well.

CONFRONTING THE DEATH PENALTY

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Introduction:
"That's the hardest thing
I've ever had to do"

THE MAJORITY OF MY TIME in Texas was spent with words. Hearing that I was a linguistic anthropologist, death penalty defense attorneys continually thrust papers at me, asking whether their proposed jury instructions were comprehensible and how they might be interpreted. They sought my advice (wisely or not) on how best to phrase their closing arguments, and what to make of the potential juror who spoke reverently of his uncle, the police officer, during voir dire. When I spoke with capital jurors after their trials, we marveled at the complex verbiage of their instructions and how confused they were by legal jargon and the laws they were charged with interpreting. Even the Texas Prison Museum prominently displayed the last words of those who had been executed, exhibited next to printed menus of their final meals.

In my memories of fieldwork, this torrent of words is broken by poignant, wordless moments. I am taken back to the small room where I sat with a defense attorney while he

restlessly waited to hear the fate of his client. He took my laptop from me and browsed through my playlist, settling on *Carmina Burana*. He sang along, his operatic tenor a surprising, pleasant break from the otherwise tense silence. I can still hear the sounds of shackles as a death row inmate approached the prison visiting room from somewhere down the inner hallway. I could always hear the inmates first, well before the hefty door swung open to reveal them standing in prison whites, flanked by guards. My nose seems to contain remnants of the stench from inside one of the oldest occupied prisons in Texas, body odor mixed with urine and old food. I recall sitting in a restaurant with a man who had served on a capital jury years before. The defendant he sentenced to death had recently been executed. The man cried briefly in that restaurant, attempting to process his role in another human's death. I can visualize a defendant's arm stretched out to me in a courtroom, strikingly pale from his time in prison, as he explained how he engineered a needle and tattooed himself while inside.

Texas capital jurors had similarly disjointed experiences. They too operated in a world of words—any legal trial takes human conflicts and textualizes them, reducing complex social interactions to verbal and written form (Felstiner, Abel, and Sarat 1980–81). From the start of jury selection, jurors were required to interpret arcane, complicated legal instructions and rules. During their deliberations, they had to somehow filter weeks of sitting through trials into a decision that could be reconciled with these rules.

Jurors' days in court, however, were also filled with affecting encounters that stood apart from the legal language they were usually occupied with. One juror spoke of the intense disgust that overtook him when he watched the defendant

during trial. He was so sickened that he had to force himself not to look at the defendant any longer in order to try to remain fair, he explained. Another juror stammered as she recalled envisioning herself as the murder victim in her trial. The victim must have realized at some point, the juror figured, after being stabbed over fifty times, that she was not going to escape. A third juror spoke of her discomfort being seated in the courtroom next to the witness stand. She was physically anxious, she said, when cuffed inmates were brought next to her to sit and testify.

While, like mine, jurors' dealings with legal words were entwined with these stirring encounters, their processing of these experiences was highly restricted in comparison to my own. For one, I was able to see each crime and each trial from multiple perspectives, spending time in the courthouse watching testimony and later visiting crime scene locations, trying to visualize, for example, how an escaping inmate's truck careened into a prison guard on horseback, sending her flying to her death. I stood in the death house, gazing at the gurney where the defendants I shared courtroom space with every day would later take their last breaths. Jurors are not afforded such experiences. Their knowledge of crimes and defendants is limited to what is presented to them during trial, to attorneys' selective show-and-tell.

And despite the varied kinds of experiences capital jurors do have during trials, their last duty is one of words. Their emotional reactions and empathic imaginings must be molded to answer two cryptic questions on their jury charge—Will the defendant be a future danger? Does any evidence mitigate the defendant's blameworthiness?¹—which translate trial encounters

1. Texas capital jurors' instructions, including these "special issue" questions, will be explained in depth in chapter 2.

into a language dictated by the law. Institutionally, this is when jurors' responsibilities end. Where these legal words lead—to the ultimate taking of a human life—is officially no longer their concern. But for many, they live and relive these words, these images, these emotions, recognizing the precise consequences their words have had.

• • •

That's the hardest thing I've ever had to do, to look at a man and, you know, know that I'm saying, you know, I don't think you should live.

I've always felt that the death penalty you know, was a good thing? This process here is kinda, makes you wanna, makes me wanna think about it . . . I, it's like I say, that's the hardest thing I ever had to do. And I never thought that it would be that hard.

—TWO FORMER TEXAS CAPITAL JURORS

This book asks one essential question: how can human beings sentence another person to die? For most jurors, serving on a death penalty case is one of the more difficult experiences of their lives. Language, as a vital human resource for sense-making, helps us navigate difficult experiences. It is therefore not surprising that, when facing the prospect of sending another person to his or her death, jurors rely heavily on language in order to make and then live with their decisions.

Relying on actual jurors' reflections on capital trials and my own observations of these trials, this book demonstrates how language filters, restricts, and at times is used to manipulate jurors' experiences while they serve on capital trials and again when they reflect on them afterward. When answering a call to jury duty, potential jurors enter the courtroom and immediately begin reconciling their own, often varied senses